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JAMES H. McKENNEY,
Clerk.

No. 58.

Supreme Court of the United States

OCTOBER TERM, 1905.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

versus

H. G. THOMPSON, Administrator of Florence James, Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Reply to Brief for H. G. Thompson, Administrator.

EDWARD COLSTON,
Attorney for Alabama Great Southern Railroad Company.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Of Counsel.

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Reply to Brief for H. G. Thompson, Administrator.

We have been furnished with a brief in this case for H. G. Thompson in opposition to the right to remove. In it counsel claim that forms of action have been abolished in Tennessee, and that all civil injuries, arising either out of contract or tort, are redressed by an action on the facts of the case (Shannon's Code of Tenn. [1896], Sec. 4438). Counsel therefore say that

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ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

vs.

H. G. THOMPSON, ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Alabama Great Southern Railroad Company in Support of the Right of Removal.

Supreme Court of the United States.

October Term 1904, No. 311.
October Term 1905, No. 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY, - - - *Plaintiff in Error*,

v.

H. G. THOMPSON, Administrator of FLORENCE JAMES, Deceased, - - *Defendant in Error.*

Brief for Plaintiff in Error in Support of the Right of Removal.

My colleague, Mr. Edward Colston, has left nothing of val[illegible] to be said on the abstract proposition certified by the Court of Appeals, and discussed in his brief.

Mr. Colston's argument, however, doubtless for the reason that the question certified does not imperatively demand it, does not touch a practical question which, if not necessarily involved in this case, is almost invariably involved when the questions certified arise, *viz.*, if the question of removal now under discussion be controlled by *State practice* on the subject of joinder of defendants, or by *State Statute* on that subject. In some States, *e. g.*, in Kentucky, the highest State Court holds

that a servant whose negligence is charged may be joined with the innocent master, and holds that such result sometimes does and sometimes does not arise from Statute. To a complete determination, therefore, of this important question it seems necessary to decide, should the question certified by the Court of Appeals be answered in favor of removal, whether or not the result would be the reverse if the State practice so decreed.

It is sometimes insisted that the question of joinder of defendants is a question of State practice, and that the Federal courts are controlled by State Statute, or decision. To support this theory the *obiter* intimations of this court in *Chesapeake & Ohio Ry. Co. v Dixon, 179 U. S. 131, 45 L. Ed. 121,* are generally invoked.

A question of greater gravity can hardly arise, for the law reports of cases in courts, and the statute books of the States teem with devices and inventions of litigants and legislatures to impair Federal jurisdiction; and it is of the utmost importance that no doctrine be announced which would recognize the right of the State Legislature to control the jurisdiction of the Federal Courts.

Our contention here submitted is that the construction of *Section 2 of the Act of March 3, 1887,* reaffirmed *August 13, 1888,* presents a *Federal,* and not a *State* question. That, accordingly, the judgment of *Federal*

Courts, and not of *State Courts* must be the criterion. This Act of Congress confers a right of removal in certain specified cases, and the State Legislatures have no power to alter, amend, or forsooth to abolish this Federal right, directly, or by indirection. They have no right to add to, nor subtract from the rights of any litigant under this statute. This Act of Congress is complete in itself; it provides for removal in a certain situation, *to wit*, when in a suit there be *a controversy wholly between citizens of different States which can be fully determined as between them alone.* This statute confers the right of removal, and was passed for that express purpose, upon a non-resident citizen finding himself involved in a controversy with a citizen of the State of the forum when the controversy is one determinable between them alone. This provision takes no account of *who may be parties to the action or suit in which the controversy be found*, nor of *what may be the rules of practice, whether common law or statutory, of the State in which the action or suit may be pending*. Indeed, the statute seems to defy State procedure, for the hypothesis upon which it is based is that there may be a separable controversy in a suit properly brought, and rightly pending in the State Court. If properly brought there all the parties to the suit are properly joined in the suit, and this controversy is properly joined with any other controversies therein, never-

theless, the whole case is removable to the Federal Court, *regardless of the State practice permitting the joinder of all the parties litigant, and of all the controversies involved.* Indeed, in the *Removal Cases, 100 U. S. 457, 468; 25 L. Ed. 593, 598, and Blake v. McKim, 103 U. S. 336, Book 26, p. 563-4,* this court held that in a controversy between citizens of different States, either party might remove the case—

> "without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If, in such arrangement, it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. *Coal Co. v. Blatchford, 11 Wall. 174* (78 U. S., XX, 180). Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute, according to the facts." &c., &c. *p. 468.*

In *Evers v. Watson, 156 U. S. 527, 39 L. Ed. 520,* this court held that under the power to rearrange the parties, and place them on different sides of the matter in dispute according to the actual facts, it would be presumed in the absence from the record of the

petition for removal, in order to sustain Federal jurisdiction that the court did so arrange the parties, saying:

> "The power of the court under the Act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to the actual facts, has been recognized by this court in several cases. *The Removal Cases, 100 U. S. 457 (25:593); Pacific R. Co. of Mo. v. Ketchum, 101 U. S. 289 (25:932); Harter v. Kernochan, 103 U. S. 562 (26:411).* If such were the case here, the suit would then stand as one, wherein two citizens of the same State were plaintiffs, and aliens were defendants, which would be removable, irrespective of the question, whether, under the second clause of the section, a separate controversy between citizens and aliens could be removed &c."

In *Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514,* this court held that when a removal of a separable controversy was effected the entire suit was removed to the Federal Court and that the right of removal was not affected by the fact that a defendant, a citizen of the same State as plaintiff, might be a proper but not an indispensable party to the separable controversy between citizens of different States. Considering the condition of the pleadings the court there said, *p. 216:*

> "The State Court ought not to disregard the petition, upon the ground that, in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more properly for the deter-

mination of the trial court, that is, the Federal Court, after the cause is there docketed."

These decisions proceed upon the idea that a controversy between two persons, citizens of different States, may exist in any suit and be separable from the rest of the suit and determinable between those two persons of diverse citizenship, and in so determining, no account whatever is taken of whether in the State Court such controversy would be regarded as separable from the rest of the suit, or as determinable between the petitioner for removal and his adversary in the controversy alone. Indeed, the practice in the State Court might be settled by judicial decision or by statute, and require all persons in anywise interested to be made parties to the suit, and, nevertheless, under the decisions just cited, the right of removal would certainly exist, if only there were in the suit the separable controversy determinable between the petitioner and his adversary alone, citizens of different States. There is no intimation that such controversy must be separable according to any rule of practice in the State Court, nor that the question whether or not it might be determined without the presence of other persons must be decided according to State practice, *e contra*, the conclusion from the decisions just noted is that the controversy may be separable and its determinability between the parties only exist regardless

of what the State Court might require as to joinder of different persons, although, possibly, it might have been otherwise "under the old law" (*"11 Wall. 174"*). The statute is meant to operate in all the States, and nevertheless the practice in any of those States may differ from that in any other State. There is no intimation in the statute that the separableness of the controversy, or its determinability between the citizens is to be determined by the practice, or the statutes of any State.

Conformably with the view we present, it is uniformly held that Federal jurisdiction can not be abridged or modified by any State statute.

In *Hyde v. Stone, 20 Howard, 173; 15 L. Ed. 874* this court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States can not be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

In *Smyth v. Ames, 169 U. S. 466; 42 L. Ed. 819,* plaintiffs sued on behalf of themselves and all others similarly situated as stockholders, to prevent their corporation enforcing illegal rates causing loss to the company. This court, considering the application of the 94th Rule, said that it was contended that plaintiff's remedy at law was adequate and the Federal Chancellor

authority in this discussion because they admit of the presence of concurrent negligence on the part of the master as a reason for joining him with the servant; while in the present case that ground is expressly excluded. Many of those cases also contain nothing more in the way of argument than the bare statement that there is such identification between master and servant that they may be joined in the same action of tort. This statement as to there being identification is convenient, but it is certainly not accurate; it is merely a mode of stating that the master is liable; the question remains whether there be negligence on the part of the master. And it begs the question to say that the negligence of the servant is the negligence of the master and is really the statement of an impossibility, unless the master participated in or has adopted or previously commanded the servant's act or omission. The master is liable in the case certified not because he is guilty of negligence but solely because he is made responsible for the negligence of another. This want of accuracy in the cases is pointed out by Amidon, J., in the case already referred to (120 Fed. Rep., 389). He says:

"For the purpose of determining the liability of the master for the negligence of the servant, it is common to say that the negligence of the servant is the negligence of the master. This, however, is a convenient rather than an accurate statement. The master is in fact negligent only when he participates in the wrongful act of his employe. This he can only do in one of three ways: (1) By direct participation; (2) by previous direction; (3) by subsequent adoption. In the case at bar, as is usual in suits of this character, there is no contention that the corporation was in fact a party in either of these respects to the negligence complained of. To say that because the master is responsible for the negligence of his agent he is therefore himself negligent is to confuse things that are widely different."

Helms v. *N. P. Ry. Co.*, 120 Fed. Rep., at p. 395.

Counsel seem to argue (p. 38 of their brief) that even though there be no joint liability there is not a severable controversy. They seem to argue that a several liability is not a separable

controversy, provided a resident defendant be joined; and this is so, they contend, even though there is no legal warrant for the union of such resident defendant. But we say that the right to remove can not be defeated by joining one whom the law does not permit to be joined. All courts that have considered the subject in the kind of cases we are now discussing, make joint liability the test of a separable controversy.

Nelson v. *Hennessey*, 33 Fed. R., 113, by Brewer, J.
Collins v. *Wellington*, 31 Fed. R., 244, by Shipman, J.

In *C. & O. Ry. Co.* v. *Dixon*, 179 U. S., 131, the question of right to remove was regarded as dependent upon whether there was a joint cause of action against the company and the individual defendants. This court said:

"Counsel for plaintiff in error contends, however, that plaintiff's complaint does not state a joint cause of action against the corporate and individual defendants, but states a separate cause of action against the railway company and a separate cause of action against the other defendants" (p. 135).

And as to that contention the court said:

"If the liability was not joint then separable controversies existed, and the argument is that the averment that the negligence complained of 'was the joint negligence of all the defendants', merely stated the conclusion of law that the company and its employes were jointly liable in the action for the injury inflicted through the negligence of the latter in the course of and within the scope of their employment, and this conclusion is denied on the ground that the liability of the company as alleged rested on a wholly different basis from that of the liability of its servants." (p. 136).

If the averment of liability of the company in that case had rested such liability upon the negligence of the servant alone, it is necessarily implied in the opinion of the court, although not expressly decided, that such liability of the company would be several. But this court held that the complaint did not bear such construction. On the contrary, it held that the allegation in the pleading of joint negligence could be construed to

include concurrent or personal negligence on the part of the master. And the court did so construe it (p. 139). Certainly this court would not have been astute to discover allegations of concurrent negligence of the master in that case and thus establish a joint liability, if joint liability had not been the point on which removal depended.

In *Gableman* v. *Peoria, Decatur & Evansville Ry. Co.*, 179 U. S., at p. 337, this court said it had been determined "in respect of the removal of actions of tort on the ground of separable controversy, that the existence of such controversy must appear on the face of the plaintiff's pleading, and that it does not so appear, if the defendants are charged with direct or concurrent or concerted wrong action," citing *C. & O. Ry. Co.* v. *Dixon*. This certainly amounts to a holding that if there is no charge of direct or concurrent or concerted wrongful action then a separable controversy *does appear*.

In *Powers* v. *C. & O. Ry. Co.*, 169 U. S., at p. 96, at the bottom, Justice Gray, delivering the unanimous opinion of this court, said:

> "It is well settled that an action of tort, *which might have been brought* against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States."

This clearly means that, in tort, the action is not joint merely because the plaintiff chooses to name a number of persons defendants. To have that effect it is necessary that the pleading show a *right* to make them defendants; for it speaks of actions which might have been brought against many or one. "Might have been brought," of course, means might have properly been brought. It is worth while to call attention to an error of language in a quotation in the Powers case, 169 U. S., at p. 97. The quotation is from the opinion in *Pirie* v. *Tvedt*, 115 U. S., 43. The correct quotation would be: "A defendant has no right

to say that an action shall be several, which a plaintiff *elects* to make joint," implying, of course, that the case is one in which the plaintiff has a right to elect. But in transcribing the quotation the writer of the opinion in the Powers case has inserted the word "seeks" in place of the word "elect," making it read: "A defendant has no right to say that an action shall be several which the plaintiff *seeks* to make joint;" as though the mere desire of the plaintiff to make the action joint was sufficient to make it so.

The same error appears in the opinion in C. & O. *Ry. Co.* v. *Dixon*, 179 U. S., at p. 138.

Our adversaries conclude their brief by saying (p. 45) that citizens of a state should have a right to redress grievances against corporations in state tribunals, and ought not to be put to the inconvenience and expense of taking witnesses into another jurisdiction which *may be* far removed from the place where the wrong was committed. If such language could have any weight with this court in any case it should have none in this instance because the suit was brought in the state court at Chattanooga and was removed to the United States Court sitting in the same city.

Respectfully submitted,

EDWARD COLSTON,
Attorney for Alabama Great Southern Railroad Company.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Of Counsel.

November, 1905.